IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)

SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No.7706/Del./2019
(ASSESSMENT YEAR : 2010-11)

ITA No.7707/Del./2019
(ASSESSMENT YEAR : 2011-12)

EY Global Services Ltd., 6, More London Place, London SE1 2DA, United Kingdom.	vs.	ACIT, Circle 1(2)(2), International Taxation, New Delhi.
(PAN : AACCE3488K)		
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : None
REVENUE BY : Shri Sanjay Kumar, Senior DR

Date of Hearing : 23.05.2022
Date of Order : 26.05.2022

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

These are appeals by the assessee against the respective orders of the ld. CIT (Appeals) for the concerned assessment years.

2. Since issues are common and connected and the appeals were heard together, these are being disposed off by this common order.

3. Since grounds are common we are referring to grounds of appeal for AY 2010-11 which read as under :-

"1. General Grounds:

1.1. That the Commissioner of Income Tax (Appeals)-42, New Delhi (hereinafter referred to as "Ld. CIT(A)" has erred in facts and in law in upholding the assessment order and assessing the income at INR 11,26,56,700 as against return income of NIL.

1.2. That on fact and in circumstance of the case and in law, the Ld. CIT(A) has erred in rejecting the application filed u/s 158A of the Act to avoid repetitive appeal on the issue which is pending before the Hon'ble Delhi High Court.

2. Grounds on taxability of Software License:

2.1. That on facts and in law, the Ld. CIT (A) has erred in not accepting the contentions of the Appellant that reimbursement of actual costs relating to Software License and maintenance charges amounting to INR 7,28,25,439 are not in the nature of Royalty under the Act as well as Double Taxation A voidance Agreement between India and UK (hereinafter referred to as "treaty") by following the ruling of Hon'ble AAR in appellant's own case and ignoring the rulings of various Hon'ble High courts on similar issue including jurisdictional Hon'ble Delhi High Court and also ruling by Hon'ble Supreme Court in case of A.P. Moller Maersk AS (2017) 392 ITR 186 holding that reimbursement of communication network charges is not taxable.

2.2. That the Ld. CIT(A) has also erred in facts and in law in holding that no appeal is maintainable on above ground as the matter has already been decided by AAR in appellant's own case, and while doing so has ignored the rulings of Hon'ble High courts on similar issue including jurisdictional Hon'ble Delhi High Court.

3. Grounds on taxability of Global technology charges and GW AN connectivity charges:

3.1. That the Ld CIT(A) has failed to consider and appreciate that the reimbursement of actual costs relating to Global technology charges and GWAN connectivity charges amounting to INR 3,65,90,140 and INR 32,41,122 are not and cannot be considered as software and thus, is not in the nature of "royalty" either under the Act or under the treaty, and are thus not taxable in India in the absence of a PE of the Appellant Company in India. Further, the Ld. CIT(A) has completely ignored the ruling by Hon'ble Supreme Court in case of A.P. Moller Maersk AS (2017) 392 ITR 186 holding that reimbursement of communication network charges is not taxable.

3.2. That the Ld. CIT(A) has also failed to appreciate that the Hon'ble AAR while pronouncing its order has held only software charges as Royalty, and thus has erred in taxing Global technology charges and G WAN connectivity charges as Royalty .

3.3. That the Ld. CIT(A) has erred in facts and in law in holding that no appeal is maintainable on above ground as the matter is pending under rectification application filed before Hon'ble AAR in appellant's own case."

4. Brief facts of the case are that EY Global Services Limited (hereinafter referred to as 'the assessee') is providing technology and other support services and software licenses to the member firms of the EY Network. The assessee is said to be established as a non-profit central service provider to enable EY member firms to share the costs of centralized services. Accordingly, the assessee enters into agreements with each member firm, pursuant to which it provides services required by member firms and thereafter, recovered various costs incurred by it from the member firms on actual usage basis. Given the above, the assessee filed a 'NIL' return of income on 30th March 2012 contending that the payments received by the assessee from Indian member firms are mere reimbursement of costs and not taxable under the Act as well as the Double Taxation Avoidance Agreement between India and United Kingdom (hereinafter referred as "the treaty").

4.1 To seek certainty on the above tax position and avoid litigation with the Tax Department, the assessee had filed an application before the Authority of Advance Ruling ("AAR") to seek an advance ruling that the

payments so received by the assessee are not taxable in India under the Act or under the treaty. The Hon'ble AAR while pronouncing its ruling held that owing to the nature of services rendered by the assessee, all services except software charges are not taxable in India. Accordingly, the Hon'ble AAR held that software charges are taxable as "Royalty" as per the provisions of the Act and the treaty.

4.2 In background of the AAR order, the Ld. AO proceeded to frame assessment for the subject year and passed the final assessment order vide order dated 30 November 2018 whereby, the following payments were held taxable @ 10% as "Royalty" under the Act as well as the treaty:

- Software license and Maintenance charges: INR 7,28,25,439/-
- Global Technology Charges : INR 3,65,90,140/-
- GWAN Connectivity Charges : INR 32,41,122/-

The reasoning for the above action of AO in detail are as follows.

5. Assessing Officer (AO) in the assessment order noted that the assessee had filed an application before the Hon’ble Authority for Advance Ruling (AAR) on 09.02.2011 for ascertaining the taxability in India of the payments received from EYGBS and EYME and for withholding taxes. The application was admitted on 07.03.2013 as under:-

> **“8. Questions raised before the AAR**
>
> **1. Whether amounts received/receivable by EYGSL UK in accordance with the agreement entered into with EYGBS India Private Limited inter alia, on account of services and/or Deliverables**

as defined in the Agreement is chargeable to tax in India as "fee for technical services" under Article 13 of the Agreement for avoidance of Double Taxation between India and UK ('the India - UK Tax Treaty)?

2. Whether the amounts received by EYGSL UK from EYGBS India Pvt. Ltd. ('EYGBS India') as reimbursement of costs for giving the "Right to benefit from the Deliverables and/or Services" under the terms of the agreement would constitute "income" in the hands of EYGSL UK within the meaning of the term in Section 2(24) of the Income-tax Act, 1961 ('the Act')?

3. Whether the payments received by EYGSL UK for giving "Right to benefit from the Deliverables and/or Services" under the terms of the agreement would be in the nature of "royalty" within the meaning of the term in:

(i) Explanation 2 to clause (vi) of Section 9(1) of the Act?
(ii) Article 13 of the India-UK Tax Treaty?

4. Based on the answers to Questions (1) to (3) above, and in view of the facts as stated in Attachment III, and also in light of the declaration provided by EYGSL UK that it does not have a permanent establishment in India in terms of Article 5 of the India-UK Tax Treaty, whether the payments received by EYGSL UK would be chargeable to tax in India?

5. Based on the answers to Questions above, would the receipts by EYGSL UK from EYGBS India suffer withholding tax under section 195 of the Act, and at what rate?

9. Answers given by the Hon'ble AAR

"36. In view of discussions in earlier paragraphs the following rulings are pronounced with respect to question raised:-

Q.1 Consideration received on account of provision of services/deliverables is not FTS.

Q.2 Consideration received amounts to receive fees and it does not amount to reimbursement of expenses.

Q.3 Consideration received for giving right to benefit from the computer software procured from several third party vendors (deliverables) is in the nature of royalty under Article 13 of India-UK DTAA as well as section 9(1)(vi) of the Act whereas consideration received for giving right to benefit from services is not in the nature of royalty under Article of India-UK DTAA.

> **Q.4 In respect of Q.No.3, we have ruled that consideration for computer software is taxable as royalty. This is irrespective of the fact whether the applicant has a PE in India or not.**
>
> **Q.5 Consideration received in respect of giving right to benefit from computer software (deliverables) by the applicant would suffer withholding of tax under section 195 of the IT Act."**

6. Thereafter, AO referred to the provisions of section 245S of the Income-tax Act, 1961 (for short 'the Act') for the proposition of binding nature of the order pronounced by Hon'ble AAR. Accordingly, he rejected the assessee's pleas by holding that the order of Hon'ble AAR was binding. He made assessee's royalty income @ 10% amounting to Rs.11,26,56,701/-.

7. Upon assessee's appeal, ld. CIT (A) noted the facts as per AO's order that he has followed Hon'ble AAR ruling in case of assessee. Ld. CIT (A) also referred that the assessee has submitted misc. application before the Hon'ble AAR which was also dismissed. Thereafter, ld. CIT(A) noted that assessee's plea of section 158A was also not relevant inasmuch as assessee has already filed Writ Petition before the Hon'ble High Court against the ruling of Hon'ble AAR. Relevant portion of ld. CIT(A)'s order reads as under :-

> **"5.5 The appellant has contended to apply the provisions of section 158A of the act which deals with a situation where an assessee claims that any question of law arising in his case for an assessment year which is pending before the Assessing Officer or any appellate authority is identical with a question of law arising in his case for another assessment year which is pending before the High Court on a reference under section 256 or before the Supreme Court on a reference under section 257 or in appeal under section 261. I find that the provisions of section 158A are not applicable in this case because**

> **of the fact that the appellant has filed writ before Hon'ble High court against the order of authority for advance ruling. The provisions of section 158A are applicable only where the reference before Hon'ble High Court is under section 256 of the act. Moreover, as discussed above, I find that the act of filing appeal before CIT(A) itself is redundant because the matter has already been decided by Authority for advance ruling which is a higher appellate forum. The act of the appellant to file writ petition before Hon'ble High Court is sufficient to keep the matter alive."**

8. Against this order, assessee is in appeal before us.

9. We have heard ld. DR for the Revenue and gone through the record. Nobody represented the assessee despite issuance of notice of hearing. Ld. DR for the Revenue submitted that the appeal is not at all maintainable inasmuch as AO has followed the ruling of Hon'ble AAR in assessee's own case, hence ld. CIT (A) has rightly dismissed the assessee's appeal as not maintainable. Therefore, he pleaded that the Tribunal should also dismiss this appeal being not maintainable. He further submitted that assessee has already filed a writ petition before the Hon'ble jurisdictional High Court against the above AAR ruling. The decision of Hon'ble High Court is still awaited.

10. Upon careful consideration, we find ourselves in agreement with the submissions made by the ld. DR for the Revenue. AO has only followed the ruling of AAR in assessee's own case and as per the provisions of section 245S of the Act, ruling of Hon'ble AAR is binding upon the Revenue authorities. The provisions of section 295S reads as under :-

> **"245S. (1) The advance ruling pronounced by the Authority under section 245R shall be binding only-**
>
> **(a) on the applicant who had sought it;**
> **(b) in respect of the transaction in relation to which the ruling had been sought, and**
> **(c) on the Principal Commissioner or Commissioner, and the income-tax authorities subordinate to him, in respect of the applicant and the said transaction.**
>
> **(2) The advance ruling referred to in sub-section (1) shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced."**

11. Once it is clear that the Revenue authorities only followed the ruling of Hon'ble AAR in assessee's own case, no fault can be found in their orders in appellate proceedings. No case has been made out that authorities below have not correctly followed the ruling of Hon'ble AAR. It is also not a case that Hon'ble High Court has reversed the order of Hon'ble AAR. In this view of the matter, we do not find any infirmity in the order of ld. CIT (A), hence we uphold the same. This appeal filed by the assessee stands dismissed.

12. Our aforesaid order applies *mutatis mutandis* to AY 2011-12 also.

13. In the result, both the appeals filed by the assessee stand dismissed.

Order pronounced in the open court on this day 26th of May, 2022.

Sd/-	**sd/-**
(ASTHA CHANDRA)	**(SHAMIM YAHYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated the 26th day of May, 2022
TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT (A)
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.